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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JUAN ANTONIO TAPIA-ORTIZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

Certiorari should be granted to determine:

1. Whether the use of expert testimony regarding information of general or common knowledge was improper and prejudicial to the appellant.

Certiorari should be granted to determine:

2. Whether a multiple conspiracies charge was required where the indictment alleged a single conspiracy yet two separate conspiracies were involved.

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OPINION BELOW

The opinion of the Second Circuit Court of Appeals (2nd Cir. 1994) is reported at 23 F.3rd 738 and appears in Appendix A of this petition.

JURISDICTION

The Court of Appeals' opinion in this matter was filed on May 9, 1994. This Court's jurisdiction is invoked under Title 28 United States Code Section.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 18 United States Code Section 702 is set forth in Appendix C.

United States Constitution Amendment V; United States Constitution Amendment VI are set forth in Appendix D.

Petitioner, Juan Antonio Tapia-Ortiz respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals for the Second Circuit.

STATEMENT OF FACTS

INTRODUCTION

The prosecution's case was based on a "reverse" or "sting" operation in which an informant for the Miami Dade police, Aldimar Isaziga Romero (hereinafter "Isaziga") was to pose as the supplier of twenty kilograms of cocaine. Although Isaziga claimed to never have been involved in the drug business, he agreed to assist his wife who had been arrested for participation in a transaction for ten kilograms of cocaine. (134-167, 237-238).[1] Isaziga claimed he was unaware of his wife's activities at the time and further claimed to still be unaware of the details. (155-156, 161) Although the trial record is unclear as to how Isaziga began meeting with Juan Antonio Tapia-Ortiz, the gravamen of his testimony was that Juan Antonio Tapia-Ortiz agreed to purchase on partial consignment, twenty kilograms of cocaine, which was taken from the stores of United States Customs. (253) Subsequently, a co-defendant was arrested taking delivery of the customs cocaine and Juan Antonio Tapia-Ortiz was arrested a few miles away. (267)

Despite numerous claimed telephone calls to and from Juan Antonio Tapia-Ortiz by Isaziga no audio tapes were made. (180-182) Nor were any of the claimed meetings with Isaziga and Juan Antonio Tapia-Ortiz recorded. (276-282, 306)

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[1] Numerical references are to trial transcript pages.

After the arrest and indictment of Juan Antonio Tapia-Ortiz he was incarcerated in the Federal Metropolitan Correctional Center and subsequently Otisville Correctional Facility. At the Metropolitan Correctional Center and Correction Facility at Otisville he met with Hector Hernandez, a medical doctor who had been arrested for trafficking in heroin. Hernandez testified he recognized the petitioner, Juan Antonio Tapia-Ortiz at Otisville, as someone from whom he had purchase one hundred gram amounts of heroin from in the past. (66,100) Thereafter, Hernandez notified authorities and the indictment was superseded to include heroin as an object of the conspiracy.

As detailed below, the remaining witnesses consisted of case agents, surveillance and arresting agents, an expert agent witness (See Point One *infra*), and a handwriting expert to confirm that appellant Juan Antonio Tapia-Ortiz's handwriting appeared or certain hotel records.

The prosecution did not claim to have seized illicit records from Juan Antonio Tapia-Ortiz, nor any large sums of money, nor any drugs, except those provided by United States Customs.

THE TRIAL

Following defense counsel's waiving of opening statement, the first witness to testify on behalf of the government was Hector Hernandez, a medical doctor turned heroin dealer. Hernandez functioned as a middleman purchasing and selling heroin and as a result pled guilty to conspiracy to possess with intent to distribute heroin. (26) Hernandez testified that he was introduced to Juan Antonio Tapia-Ortiz sometime in 1990. Hernandez testified he did not know appellant, Juan Antonio Tapia-Ortiz's real name initially, but called him "Flaco". (29) Over objections, Hernandez was allowed to testify that subsequent to his arrest he saw Juan Antonio Tapia-Ortiz in the Metropolitan Correctional Center and subsequently in Otisville prison and that they talked about the weakness of the case against him; that he (Juan Antonio Tapia-Ortiz) would be going home soon; and general discussion of other "groups" and what should be done to informants. (65-67)

Over defense objection, Hernandez testified that he had a conversation with Mr. Tapia while in Otisville prison during which he was threatened. (65-67) On cross-examination Hernandez identified Unit 3 as the location where the alleged threatening conversation took place. (114)[2]

Hernandez testified he thereafter told authorities that Juan Antonio Tapia-Ortiz had been his supplier. To bolster his claim Hernandez was permitted to testify from the drug records he was arrested with. Hernandez claimed these records reflected one hundred gram amounts sold him by Juan Antonio Tapia-Ortiz who he testified was indicated by the name "Flaco".

The government's next witness was Aldemar Isaziga, a "clothing salesman" acting as a confidential informant for the government in order to obtain credit for his wife, who had pled guilty to possession of cocaine. Isaziga testified that he met in August of 1991 for the purpose of discussing a twenty kilogram cocaine transaction. (136) This cocaine was to be provided by the United States Customs Service. (253) Isaziga testified they agreed on a price of $260,000, with $100,000 to be paid by Juan Antonio Tapia-Ortiz in advance. (136)

Isaziga worked in conjunction with Officer Jerry Rodriguez of the Metro Dade Police Force. Juan Antonio Tapia-Ortiz was not present at a meeting during which Isaziga received $22,000 from another individual. Thereafter, a second meeting occurred at a Denny's Restaurant in Miami and was observed by Rodriguez. Isaziga and surveillance agents testified Isaziga was given a bag containing $78,000 at the conclusion of this meeting. (149)

Following the second of the two Miami meetings, Isaziga boarded a flight to New York with agents. According to the testimony by sheer coincidence on that flight was the petitioner Juan Antonio Tapia-Ortiz, Jerry Rodriguez and two United States Customs agents. (228).

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[2] Subsequent proceeding established that Juan Antonio Tapia-Ortiz was housed exclusively in Unit 4 and that he had not been incarcerated in Unit 3 with Hernandez.

The next day Isaziga testified that arrangements were made between Isaziga and Juan Antonio Tapia-Ortiz for delivery at the Marriott Hotel in Long Island as before nothing was recorded. (148) Isaziga testified that when Juan Antonio Tapia-Ortiz and co-appellant Ernesto Velez-Morales arrived, he introduced them to Detective Luis Torres, who was posing as his "worker" (149). Torres testified that he then walked out, along with the Ernesto Velez-Morales, to the car where the cocaine was hidden. After showing Ernesto Velez-Morales the contents of the trunk, he handed him the keys to the car and co-defendant drove off (274). Juan Antonio Tapia-Ortiz then left by a separate car, Juan Antonio Tapia-Ortiz was subsequently arrested two or three miles from the hotel. (267). Both audio and video recordings of the controlled delivery at the Marriott were made by the government. (276-282). Remarkably Juan Antonio Tapia-Ortiz did not appear on the audio portion of the recording. (305-306).

During cross-examination of Isaziga, the defense attempted to question Isaziga about his relationship to his wife of twenty-two years and his knowledge of her drug involvement. (204). The court limited this cross-examination on Isaziga's involvement in his wife's drug dealing as well as his brother's drug involvement or his successful assumption of a drug dealer's identity. (208-212). The defense's crossexamination of this key government witness was limited to establishing that co-defendant was not present at the Isaziga meetings. (206). (See Point Two *infra*).

Thereafter, United States Customs Agent Alan Payne testified about the particulars surrounding Juan Tapia's arrest. The government sought to admit into evidence the expert testimony of DEA Agent James Glauner. Over defense objection that the testimony concerned matters not at issue, Glauner was permitted to testify. (346). Agent Glauner testified that a typical drug dealer uses beepers, cash and nicknames in order to conceal his identity. (391-93). (See Point One *infra*).

APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Court of Appeals for the Second Circuit in an opinion by Judge Walker who was joined by Judge Miner and District Court Judge Munson ruled that since the government did not stress the similarity of the defendant's actions to the description of a typical drug transaction as set forth by the governments expert witness' petitioner's case falls outside the scope of recent Second Circuit cases such as *United States v. Cruz*, 981 F.2d 659 (2nd Cir. 1992) and *United States v. Castillo*, 924 F.2d 1227 (2nd Cir. 1991) which had held the use of experts to comment on non-esoteric aspects reasonably within the ken of the jury was reversible error.

The circuit court did not address petitioner, Juan Antonio Tapia-Ortiz's contention that he was denied a fair trial by the combination of multiple conspiracies into a single conspiracy count contained in the indictment.

However, the Court did reverse and remand petitioner Tapia-Ortiz's case for resentencing finding that the District Court was clearly erroneous in its determination that petitioner's culpable conduct for guideline purposes should include a 60 to 100 kilogram heroine deal that was discussed between a government informant and a South American individual never arrested or charged without proof that Tapia-Ortiz agreed to the future transaction or had knowledge of it.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because:

1. The reviewing panel of the United States Court of Appeals for the Second Circuit deviated from established Second Circuit Court of Appeals precedent.

2. Petitioner Tapia-Ortiz's Fifth and Sixth Amendment Rights to a fair trial were violated.

POINT ONE

THE TRIAL COURT ERRED IN ADMITTING "EXPERT" TESTIMONY PURSUANT TO FED. RULE EVID. 702 BECAUSE THE SUBJECT MATTER OF THE TESTIMONY WAS NOT BEYOND THE KEN OF THE JURY AND THE PREJUDICIAL EFFECT OF THE TESTIMONY FAR OUTWEIGHED ITS PROBATIVE VALUE

The Second Circuit Court of Appeals failed to apply established precedent to the present case with regard to the use of expert testimony. The use of expert testimony on non-esoteric matters evident to the average juror has consistently been deemed improper. The government's use of an expert to testify about the use of cash and nicknames by drug dealers unduly prejudiced the petitioner Tapia-Ortiz and requires that a new trial be granted.

The Federal Rules of Evidence Rule 702 states that expert testimony is admissible where "scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue". In the present case, the expert testimony was not required by the jury in order to "determine a fact in issue" since Special Agent Glauner's testimony did not concern a genuine issue in the case. Defense counsel did not argue that the prosecution's chief witness Hernandez's version of events was an unrealistic or improbable depiction of drug transactions. Thus, the role of beepers, drug purities, cash and nicknames in the drug trade was not an issue that the parties disputed or which there jury had to determine. Special Agent Glauner's expert testimony concerning these undisputed facts was irrelevant and should have been ruled inadmissible.

In addition to its irrelevance, Glauner's testimony was inadmissible because it related to evidence which the jury was capable of fully understanding without the use of expert testimony. Whether or not experts may be used depends on "whether the untrained layman would be qualified to determine

intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute". Federal Rules of Evidence 702 advisory committee's note (quoting Ladd, Expert Testimony, 5 Vand. L. Rev. 414,418 (1952)). In the instant case, expert testimony was simply not necessary to enlighten New York jurors to the fact that drug dealers use beepers, cash, and nicknames in order to insulate themselves. Where expert testimony relates to "lay matters which a jury is capable of understanding and deciding without the expert's help" it should be excluded. *Andrews v. Metro-North Commuter R.R. Co.*, 882 F.2d 705, 708 (2nd Cir. 1989). Glauner's testimony did nothing to clear up esoteric evidence which the jury had to interpret. Instead the government used Glauner's testimony for the sole, impermissible purpose of lending credibility to the prosecution's argument through the aura of expertise.

Expert evidence otherwise admissible under Federal Rules of Evidence 702 is still subject to exclusion under Rule 403, "if its probative value is substantially outweighed by the danger of unfair prejudice". In the present case, Glauner's testimony should not have been admitted because it did not relate specifically to appellant's activities but rather called for the improper inference that appellant's guilt could be inferred from the conduct of unrelated persons. In *United States v. Cruz*, 981 F.2d 659, 663 (2nd Cir. 1992) the Second Circuit recognized the substantial danger of unfair prejudice arising from expert testimony;

> "although such expert testimony logically adds nothing to the believability of a witness' account (although a suggestion of implausibility), it strongly suggests to the jury that a law enforcement specialist – here an arresting officer – believes the government witness to be credible and defendant to be guilty, suggestions we have previously condemned."

Expert testimony such as Glauner's is imbued with an aura of reliability and trustworthiness when offered by the government in criminal cases, and poses a very real threat to a defendant's constitutional right to a fair trial, *United States v. Fosher*,

590 F.2d 381, 383 (1st Cir. 1979); *United States v. Amaral*, 488 F.2d 1148, 1152 (9th Cir. 1973); *United States v. Green*, 548 F.2d 1261, 1268 (6th Cir. 1977).

The government's use of expert testimony in this case was contrary to Second Circuit law. In *Cruz*, 981 F.2d 659 the Court of Appeals reversed a defendant's conviction on the grounds that expert testimony had been improperly admitted. In that case, the defendant was charged with conspiracy to possess, possession, and distribution of cocaine. The government sought to prove that defendant had served as an intermediary or "broker" during several drug transactions. Over trial counsel's objection, an expert was permitted to testify about typical drug trafficking operations in the Albany and Washington Heights area and specifically the role of a "broker" in those operations. The expert's testimony described the use by drug dealers of middlemen, beepers, and "pseudo" or "street" names. *Cruz*, 981 F.2d at 660. The Second Circuit held that, although the evidence was legally sufficient to convict the defendant, the trial court's admission of this testimony constituted reversible error.

The Court reasoned that since the matters testified to were "evident to the average juror", and since the defense had not attempted to characterize the prosecution witness' version of events as "improbable descriptions of drug transactions", the testimony was inadmissible.

> "We hold only that the operations in question must have esoteric aspects reasonably perceived as beyond the ken of the jury and that expert testimony cannot be used solely to bolster the credibility of the government's fact–witness by mirroring their version of events."

Cruz, 981 F.2d 663.

In so ruling, the court reaffirmed its holding in *United States v. Castillo*, 924 F.2d 1227 (2nd Cir. 1991). In *Castillo*, 924 F.2d at 1232 an officer was permitted to testify as to various, aspects of typical drug transactions. Specifically, he described, *Inter alia*,

"what scales . . . and guns are used for by drug dealers." The court reversed the defendant's conviction stating that the matters testified to were "apparent without the elaborations of an expert."

> "We are not convinced that New York jurors in today's climate, flush with daily news of the latest drug bust, need an expert to enlighten them as to such elementary issues as the function of a scale or index card in a drug deal. The need is even less apparent when an eye witness . . . has already explained or described the relevant procedures and equipment."

Castillo, 924 F.2d at 1232.

In the case at bar, the trial court permitted Special Agent Glauner to testify as an expert regarding the use of beepers and cash in the drug trade. Because Agent Glauner's highly prejudicial testimony did not relate to any facts in dispute, or to any concepts even reasonably beyond the comprehension of the average juror, it served solely to bolster the government witnesses' version of events and was thus inadmissible.

Over defense objection, Agent Glauner was permitted to testify about typical drug dealers and their methods (343-344, 350). According to Glauner, drug dealers typically carry beepers so "they can be contacted readily and . . . and don't have to use certain phones" (351). A drug dealer is a "clandestine type" who uses public phones "thus avoiding wiretaps and interceptions" (351). Furthermore, Glauner explained, drug dealers usually deal strictly with cash because "it's much easier to conceal and is the method that drugs are sold on the street." (352).

Agent Glauner also testified that a typical drug dealer will use a nickname or only one of his names in order "to conceal his identity. He also keeps a record detailing his transactions including sellers, buyers, amounts both paid and due, and the purities of the drugs involved. Lastly, Glauner calculated that the 19.1 kilos of cocaine would yield between an estimated 290,000 to 300,000 units with a value of approximately $280,000 to $300,000." (352).

This testimony did not assist the jury in determining a complex issue of fact but rather served, improperly, as a second summation of the government's theory of the case. Special Agent Glauner's testimony amounted to nothing more than the prosecutors theory of the case in that since the various aspects of the drug trade to which he testified, (i.e. the use of beepers, cash, nicknames, and records), were all in some way present in appellant's case. The only conclusion the jury could draw from the testimony was that the petitioner was a drug dealer. Clearly, none of his testimony aided the jury in understanding matters beyond their competence.

Courts have long recognized the dangers involved when the use of expert testimony "permits the government an additional summation by having the expert interpret the evidence." *United States v. Brown*, 776 F.2d 397, 401 (2nd Cir. 1985) Thus, courts have permitted expert testimony only when the subject matter explained has "esoteric aspects reasonably perceived as beyond the ken of the jury." *Cruz*, 981 F.2d at 663. Since Agent Glauner's testimony was mostly related to easily comprehensible matters, it was improperly admitted.

In the present case, the testimony of Agent Glauner did not concern any subject matter in need of expert elaboration. The role of beepers, nicknames and records had already been testified to by the government's first accomplice witness making Glauner's testimony nothing more than a reiteration and bolstering of that testimony complete with the added authority of an "Expert". Moreover, the expert testimony in this case was improperly admitted because it did not relate to a genuine issue before the jury. Agent Glauner's expert testimony was inherently prejudicial while containing little if any probative value it should not have been admitted.

POINT TWO

PETITIONER TAPIA-ORTIZ'S FIFTH AND SIXTH AMENDMENT RIGHTS TO A FAIR TRIAL WERE VIOLATED WHEN A REQUIRED MULTIPLE CONSPIRACY CHARGE WAS NOT GIVEN BY THE DISTRICT COURT JUDGE

It is improper to charge a single conspiracy when multiple conspiracies are, in fact, involved. Despite trial counsel raising the issue of the existence of multiple conspiracies, the trial judge refused to charge the jury regarding the proper use of the trial testimony indicating the existence of two conspiracies (358, 361, 435). Furthermore, the Second Circuit Court of Appeals failed to address this issue when raised on appeal. See Appendix A. The established law of the Second Circuit Court of Appeals, as well as that of other circuits, dictates that a multiple conspiracy charge is required when there is sufficient evidence for a jury to find multiple conspiracies existed. Accordingly, petitioner Tapia-Ortiz prays for a writ of certiorari from this Court because of the substantial prejudice suffered by him due to the trial court's failure to instruct the jury regarding the proper use of the evidence before it.

It is well settled that "a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Matthews v. United States*, 485 U.S. 108 (1988). To justify reversal for failure to give a required multiple conspiracy charge, a defendant must show both the likelihood of multiple conspiracies having existed, that separate networks operated independently from one another, and substantial prejudice resulted from the failure to give the requested charge. *United States v. Alkins*, 925 F.2d 541, 554 (2nd Cir. 1991); *United States v. Maldonado-Rivera*, 922 F.2d 934 (2nd Cir. 1990), other citations omitted; *United States v. Stowell*, 953 F.2d 188, 189 (5th Cir. 1992); *United States v. Haren*, 952 F.2d 190, 196 (8th Cir. 1991); *United States v. Dennis*, 917 F.2d 1031 (7th Cir. 1990). The question of whether the evidence has established one conspiracy or more than one is "a question of fact for a properly instructed jury to decide." *United*

States v. Alkins, 925 F.2d 541, 553 (2nd Cir. 1991). The refusal of the trial judge to charge the jury on multiple conspiracies created an impermissible variance of proof at trial by allowing the jury to find guilt on several distinct conspiracies charged in a single count.

In *Kotteakos v. United States*, 328 U.S. 750 (1946), the Supreme Court set forth the standard to be applied in resolving whether or not the commonality that is required for proper joinder under Rule 8(b) of the Federal Rules of Criminal Procedure, exists in conspiracy cases. In *Kotteakos*, a central conspirator named Brown had acted as a broker placing fraudulent applications for loans under the National Housing Act. Various defendants had obtained loans through Brown, but each loan and each defendant were independent of each other. The Supreme Court held that reversal was required since the proof established several conspiracies "notwithstanding only one was charged in the indictment". *Kotteakos* 328 U.S. at 755

In *Blumenthal v. United States*, 332 U.S. 539 (1974), the Supreme Court was careful to explain *Kotteakos*, detailing the difference between a single conspiracy and multiple conspiracies:

> No two of those agreements [in *Kotteakos*] were tied together as stages in the formation of a larger, all inclusive combination, all directed to achieving a single, unlawful end. Each loan was an end in itself, separate from all others, although all were alike, in having similar illegal objects.

Blumenthal, 332 U.S. at 538.

The key question is whether all of the charged activities were directed toward achieving a "single unlawful end" as required by *Blumenthal*. If several "distinct and disconnected" conspiracies exist which are not drawn together "in a single overall, comprehensive plan" then joinder in a single indictment is improper under Rule 8(b).

In the present case, the proof shows the existence of at least two distinct conspiracies. At the very least, the proof was

"susceptible to the inference that there was more than one conspiracy" making a multiple conspiracy charge necessary. Multiple conspiracies exist where the proof shows "separate networks operating independently of each other". *United States v. Barlin*, 686 F.2d 81, 89 (2nd Cir. 1982). Here, the alleged network to sell heroin and the network to sell cocaine clearly operated independently of each other and were not stages in a "larger all inclusive" agreement. Contrary to the single conspiracy charged in the indictment, the proof sought to establish that petitioner distributed heroin and sought to purchase cocaine, but presented "no evidence linking them together in a single conspiracy". *United States v. Miley*, 513 F.2d 1191, 1206 (2nd Cir. 1975).

In *United States v. Stowell*, 947 F.2d 1251, 1258, 1259 (5th Cir. 1991), rehearing denied 953 F.2d 188, cert. denied __ U.S. __, 112 S.Ct. 1269, a panel of the Fifth Circuit held that a multiple conspiracy instruction was required although the evidence supported a finding of a single conspiracy. In *Stowell*, testimony was given that defendant Wood, while involved in the conspiracy to import marijuana, was not a member of the conspiracy to possess marijuana with intent to distribute. In holding that, "Although the evidence supported a finding of a single conspiracy in this case, Wood was entitled to a jury instruction explaining that he could be acquitted if it was found that he was a member of a different conspiracy than the one charged." *Stowell*, 947 F.2d at 1259. In finding the district court committed reversible error by refusing to include a multiple conspiracies instruction, defendant Wood's conviction was reversed. *Stowell*, 947 F.2d at 1259.

Analogous to the facts of *Stowell*, while the two objects of the government's charged conspiracy in the case at bar represented different stages of a drug transaction, they did not represent different stages of the same drug transaction. The prosecution's proof at best alleged that at least two separate conspiracies were involved albeit with similar illegal ends. The conspiracy to possess and distribute heroin involved different times and places and involved different people from the conspiracy to possess and distribute cocaine.

The record indicates that Hernandez, the government's chief witness regarding the heroin conspiracy, had no knowledge of or connection to Isaziga, the chief witness concerning the cocaine conspiracy. The fact that different narcotics were involved, with the different sources and locations which that entails, strongly indicates that these were separate, unconnected transactions inappropriately charged as a single conspiracy for the sake of convenience.

Similarly, in *United States v. Dennis*, 917 F.2d 1031 (7th Cir. 1990), the indictment alleged a single overarching conspiracy joining three defendants, but the trial evidence could have been reasonably viewed as establishing two separate conspiracies. In reversing the defendant's conviction, the court held,

> "the failure of the district court, over Dennis' objection, to give a multiple conspiracies instruction was error. The defendant in a criminal case is entitled to have the jury consider any theory of the defense which is supported by law and which has some foundation in the evidence. (citation omitted) There was substantial evidence to show multiple conspiracies rather than a single conspiracy, and the district court's refusal to give an instruction on Dennis' multiple conspiracies theory denied Dennis a fair trial."

Dennis, 917 F.2d at 1032.

In the case at bar, whether the heroin and cocaine transactions were separate conspiracies or part of a single overall conspiracy was a question of fact for the jury to determine. Certainly, it was at least possible for the jury to infer that more than one conspiracy was in fact involved. When such is the case the jury must be given a multiple conspiracies charge. *Alkins*, 925 F.2d at 554, citing, *United States v. Maldonado-Rivera*, 922 F.2d 934, 962 (2nd Cir. 1990); *United States v. Uccio*, 917 F.2d 80, 87 (2nd Cir. 1990), *United States v. Friedman*, 854 F.2d 535, 561 (2nd Cir.) *cert. denied* 490 U.S. 1004 (1989). Judge Platt improperly determined the issue himself when during a colloquy with trial counsel he stated, "There is one conspiracy. . . a

conspiracy to buy and sell narcotics." (357, 358). Judge Platt then refused to give the jury a multiple conspiracies charge over counsel's plea for the instruction. (434, 435).

Judge Platt compensated for omitting a multiple conspiracy instruction to the jury by submitting to the jury special interrogatories. The use of special interrogatories could not and did not compensate for Judge Platt's failure to guide the jury as to the proper use of the testimony indicating the existence of multiple conspiracies the special interrogatories asked the jury to determine the wrong issue. Whereas, the interrogatories instructed the jury that guilt on count one followed from guilt on either of its objects, the real question was whether each object of the charged conspiracy constituted (a separate conspiracy). If the jury finds that a series of separate conspiracies existed, rather than the single conspiracy charged, the jury must acquit on the conspiracy count. *Alkins*, 925 F.2d at 553; *United States v. Beech Nut Nutrition Corp.* 871 F.2d 1181, 1192 (2nd Cir. 1989).

The failure of the trial court to give a multiple conspiracies charge substantially affected the rights of petitioner Tapia-Ortiz. The trial court's charged allowed the jury to convict on count one if they found proof of either of the two conspiracies. This clearly prejudiced petitioner Tapia-Ortiz. A jury determination that petitioner Tapia-Ortiz had conspired to do one of the "objects", but not the other would have contravened the government's assertion that petitioner Tapia-Ortiz had conspired to do both as part of a single conspiracy. Nonetheless, the charge of the court would have mandated that the jury convict appellant where acquittal was actually proper.

That the special interrogatories used indicate that the jury believed appellant conspired to do both is irrelevant. At the trial level, it is the judge's duty to charge the jury concerning multiple conspiracies "whenever there is sufficient evidence to support such a conclusion from the facts". The purpose of the charge is to minimize the threat of prejudicial "spill over" of evidence and to promote the goal of "keeping distinct conspiracies distinct". *Kotteakos*, 328 U.S. at 750. This is especially true where,

as here, the improper joinder permitted the prosecution to use the testimony of unrelated informants to bolster each other.

The trial judge's refusal to alert the jury to a possible indictment error in the government's allegation of a single conspiracy with two objects substantially prejudiced the defendants. The jury may have found that the cumulative evidence of the two "objects" was enough to convict on the single conspiracy charged, where it may not have been enough to convict on two separate conspiracies. Furthermore, there was the risk that the jury may not have sufficiently considered the evidence concerning one conspiracy if they felt that proof of the other conspiracy was sufficient for a conviction regardless. It is just this type of "spill over" of evidence which a multiple conspiracies charge would have prevented. The failure of the trial judge to give a multiple conspiracies charge constituted reversible error and deprived defendant of a fair trial under the Fifth and Sixth Amendments of the United States Constitution.

CONCLUSION

WHEREFORE, it is respectfully requested that this Court issue a Writ of Certiorari to review the judgment and opinion of the Second Circuit Court of Appeals in this matter.

Dated: Brooklyn, New York
August 5, 1994

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 757, 332 — August Term 1993

(Argued December 13, 1993 Decided: May 9, 1994)

Docket Nos. 92-1435, 93-1322

UNITED STATES OF AMERICA,

Appellee,

v.

JUAN ANTONIO TAPIA-ORTIZ and
ERNESTO VELEZ-MORALES,

Defendants-Appellants.

B e f o r e : MINER and WALKER, *Circuit Judges*, and
MUNSON, *District Judge.**

Defendants Juan Tapia-Ortiz and Ernesto Velez-Morales appeal from judgments entered in the United States District Court for the Eastern District of New York (Platt, *C.J.*), convicting them after a jury trial of conspiring to distribute heroin and cocaine in violation of 21 U.S.C. § 846, and of possessing cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1).

Affirmed in part, vacated and remanded in part.

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* Honorable Howard G. Munson, Senior District Judge, United States District Court for the Northern District of New York, sitting by designation.

BARRY E. SCHULMAN, Schulman & Laifer, Esqs., Brooklyn, New York, *for Defendant-Appellant Tapia-Ortiz.*

RICHARD WARE LEVITT, Esq., New York, New York, *for Defendant-Appellant Velez-Morales.*

BRIDGET M. ROHDE, Ass't U.S. Attorney, Brooklyn, New York (Zachary W. Carter, U.S. Attorney for the Eastern District of New York, David C. James, Ass't U.S. Attorney, Brooklyn, New York, of counsel), *for Appellee.*

WALKER, *Circuit Judge:*

Defendants Juan Tapia-Ortiz and Ernesto Velez-Morales appeal from judgments entered in the United States District Court for the Eastern District of New York (Thomas C. Platt, Jr., *Chief Judge*), convicting them after a jury trial of conspiring to distribute heroin and cocaine in violation of 21 U.S.C. § 846, and of possessing cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1). Defendants argue that their convictions should be reversed because the Government improperly bolstered its case by introducing expert testimony regarding the habits of narcotics traffickers. Tapia-Ortiz also contends that his sentence was erroneously determined based in part on his alleged participation in an uncharged but related heroin transaction. We reject defendants' argument regarding the expert testimony and affirm the convictions but vacate Tapia-Ortiz's sentence and remand for further proceedings.

BACKGROUND

The evidence at trial, presented through two informants and several law enforcement officers, demonstrated that from November 1990 to September 1991, both defendants were involved in a conspiracy to distribute heroin and cocaine.

The defendants' involvement in the heroin trade was established by an informant, Hector Hernandez, who testified that on ten to fifteen occasions in 1990 and 1991 he bought heroin from the defendants at one or another of two bars in Brooklyn, one of which was owned by Tapia-Ortiz. Beginning in March 1991, Hernandez recorded his purchases in a composition book in which he kept track of his narcotics transactions. Hernandez testified that he contacted Tapia-Ortiz, whom he knew as "Flaco," by using an agreed-upon beeper system. After beeping Tapia-Ortiz, Hernandez would enter a special code number after his telephone number so that Tapia-Ortiz would know who was calling. When Velez-Morales was arrested, he had on his person a business card from one of the bars with Hernandez's beeper number and code number written on it.

Defendants' cocaine trafficking was established by several law enforcement officers and an informant named Aldimor Isaziga Romero. Working with undercover agents, Isaziga negotiated with Tapia-Ortiz, also known to him as "Flaco," for the sale to defendants of approximately twenty kilograms of cocaine for $260,000, with $100,000 due in advance. In August 1991, Isaziga received the advance monies: $22,000 from an associate of defendants and $78,000 directly from Tapia-Ortiz. Both payments took place in Florida and were in cash. Several days later in New York, Isaziga and an undercover agent brought the cocaine in the trunk of a car to the parking lot of a hotel on Long Island and met the defendants in the hotel. The agent escorted Velez-Morales to the car, opened the trunk to show him the twenty kilograms of cocaine, gave him the car keys, and allowed him to drive away. After leading officers on a high-speed car chase, Velez-Morales was apprehended. Tapia-Ortiz was arrested in his car shortly after leaving the hotel. At the time, he was in possession of a beeper and business cards with contact numbers written on them.

In addition to the eyewitness testimony as to these events, the Government introduced expert testimony on narcotics trafficking through Special Agent James Glauner of the Drug Enforcement Administration. Over defense objection, Agent Glauner testified about the amount and purity of the cocaine possessed

by defendants; the dosages it would yield and their street value; the ways in which narcotics traffickers conceal their activities by using false names, cash, and beepers; and the practice of using a beeper code so that the receiver will know who is calling. Glauner also concluded after reviewing Hernandez's composition book that it was an accounting record of heroin transactions.

The jury found defendants guilty of conspiring to distribute heroin and cocaine and of possessing cocaine with the intent to distribute it. Tapia-Ortiz received a prison term of 480 months and five years supervised release and was given a $100,000 fine and a $100 special assessment. Velez-Morales was sentenced to prison for 210 months, to be followed by five years supervised release, and was given a $100 special assessment. Both sentences were imposed under the Sentencing Guidelines.

Tapia-Ortiz's greater sentence was based in substantial part upon a determination of his base offense level that, in addition to the offenses for which he was convicted, included his alleged participation in planning an uncharged but related heroin transaction. The inclusion of the heroin transaction was based upon testimony provided by Special Agent Allan Payne of the United States Customs Service at a *Fatico* hearing that Isaziga had told Payne that the cocaine deal was simply a "test run" for a 60 to 100 kilogram heroin deal and that Tapia-Ortiz was supposed to serve as the buyer of both the cocaine and the heroin.

DISCUSSION

I. The Use of Expert Testimony

The decision to admit expert testimony under Rule 702 of the Federal Rules of Evidence is left to the "broad discretion" of the district court and will be sustained unless "manifestly erroneous." *United States v. Nersesian*, 824 F.2d 1294, 1308 (2d Cir.), *cert. denied*, 484 U.S. 958 (1987). Defendants contend that the trial court committed such manifest error in admitting the expert testimony of Agent Glauner because the subject matter of his testimony was not beyond the ken of the jury. Defendants

rely primarily on *United States v. Cruz*, 981 F.2d 659 (2d Cir. 1992), and *United States v. Castillo*, 924 F.2d 1227 (2d Cir. 1991). In both cases, we reversed the defendants' convictions because the Government improperly used expert testimony on the drug trafficking trade.

In *Cruz*, we held "that expert testimony cannot be used solely to bolster the credibility of the government's fact-witnesses by mirroring their version of events." 981 F.2d at 664. In that case, a law enforcement official gave expert testimony about the conduct of brokers who arrange drug transactions between purchasers in Albany and suppliers in the Washington Heights area of Manhattan which corresponded closely to earlier factual accounts of the defendant's alleged activities. In *Castillo*, a detective testified about typical operating methods of Washington Heights drug dealers, describing their work apartments, the drug-related materials typically found within these apartments, and the practice of making potential customers snort cocaine. We held that the admission of this expert testimony was erroneous because the jury was capable of understanding these matters without the expert's assistance. 924 F.2d at 1233. In both cases, the Government relied heavily on the expert testimony during summation, stressing the similarities between the witnesses' version of events and the expert's description of typical drug transactions. While reaffirming our position "that the operations of narcotics dealers are a proper subject for expert testimony," we cautioned that such testimony should normally be used only for subjects that have esoteric aspects reasonably perceived as beyond the ken of the jury. *Cruz*, 981 F.2d at 664; *Castillo*, 924 F.2d at 1232.

This case is different from the situations presented in *Cruz* and *Castillo*. Agent Glauner did not give a narrative statement of a typical drug transaction that mirrored the testimony of the Government's fact-witnesses. On the contrary, he provided brief, crisp answers to the Government's questions about several discrete topics: the purity and the weight of the cocaine seized from the defendants, the dosages this cocaine would yield for resale on the street, the wholesale price of the cocaine, the use

of beepers by narcotics traffickers, the technique of using codes with beepers to signal the identity of the caller, and the use of cash and nicknames or false names by drug traffickers. In addition, Agent Glauner opined that Hernandez's composition book was an accounting record of drug sales. His substantive testimony constituted only five pages of a trial transcript that spanned 486 pages.

While some of the subjects about which Agent Glauner testified are more esoteric than others, his statements fell within the bounds of acceptable use of expert testimony. Testimony about the weight, purity, dosages, and prices of cocaine clearly relates to knowledge beyond the ken of the average juror. Our circuit has also previously permitted expert testimony regarding the use of beepers and code numbers by narcotics traffickers, *United States v. Ginsberg*, 758 F.2d 823, 830 (2d Cir. 1985), and the accounting books they keep in connection with narcotics transactions, *United States v. Diaz*, 878 F.2d 608, 616-18 (2d Cir.), *cert. denied*, 493 U.S. 993 (1989). Agent Glauner's information about the purity, weight, and value of the cocaine was relevant to proving that the drugs in this case were intended for distribution, and his testimony about the use of beepers and the accounting book was helpful in understanding the business cards found in defendants' possession and Hernandez's composition book. The admission of Agent Glauner's testimony on these subjects was therefore not manifestly erroneous.

We recognize that the Agent's testimony regarding traffickers' use of cash and nicknames in order to conceal their identities has a common sense aspect to it that makes its admission more troubling. However, as we indicated in *Cruz*, expert testimony may be used "on some occasions to explain even non-esoteric matters, when the defense seeks to discredit the government's version of events as improbable criminal behavior." 981 F.2d at 664. Counsel for both defendants asserted such a defense.

Counsel for Tapia-Ortiz acknowledged that Tapia-Ortiz had conversations with Isaziga, appeared at the meeting at the Long Island hotel where the cocaine was delivered, and possessed

business cards with phone numbers written on the back when arrested, but argued that his conduct could not have been criminal because the agents allowed him to leave the Long Island hotel without arresting him. Counsel for Velez-Morales similarly asserted that his activities were not related to narcotics. He argued that Velez-Morales's possession of a business card with Hernandez's beeper number and code number was meaningless because there was no evidence that he possessed a beeper; that although Velez-Morales wired money to Tapia-Ortiz in Florida prior to the latter's delivery of money to Isaziga, evidence of this transaction was simply an attempt to create guilt by association; that there was no way for Velez-Morales to know that there were drugs in the trunk of the car he drove away from the Long Island hotel; and that the ensuing high-speed chase occurred because anyone in those circumstances could "panic."

Because both defendants argued that the Government's version of events did not suggest criminal activity, the Government was justified in introducing expert testimony explaining that drug traffickers employ certain techniques, such as using beepers, cash, and nicknames, in order to avoid detection. *See United States v. Brown*, 776 F.2d 397, 400-02 (2d Cir. 1985) (police officer permitted to describe typical drug buy in Harlem, including the role of a steerer, where the accused's defense was that he was on the scene but unaware of any drug transaction), *cert. denied*, 475 U.S. 1141 (1986).

Our conclusion that no error occurred in this case is supported by the fact that the Government did not place great emphasis on Agent Glauner's testimony in its summation. While the prosecutor incorporated information about the weight and dosages of the seized cocaine into his remarks, he explicitly referred to Agent Glauner only once. In the context of discussing Hernandez's accounting book, which contained multiple references to "Flaco," the prosecutor reminded the jury that Agent Glauner "told you that drug dealers use nicknames." He also stated that because drug-dealing is an illegal business, traffickers will "pay in cash" and "use beepers" in order to avoid detection. These statements reflect the total use of Agent Glauner's testimony during summation.

Unlike in *Cruz* and *Castillo*, the prosecutor did not stress the similarities between the testimony of its fact-witnesses and an expert's description of a typical drug transaction. As such, this case simply does not present the problem of the Government impermissibly using expert testimony to bolster the credibility of its fact-witnesses by mirroring their version of events. In addition, although testimony properly admitted under Rule 702 can still be excluded under Rule 403 on the basis that its probative value is outweighed by its prejudicial effect, we do not believe that the district court abused its discretion in determining that the usefulness of Agent Glauner's testimony was not outweighed by a danger of unfair prejudice. *See United States v. Roldan-Zapata*, 916 F.2d 795, 805 (2d Cir. 1990), *cert. denied*, 499 U.S. 940 (1991).

Accordingly, we deny both defendants' claims that their convictions should be vacated based on the admission of Agent Glauner's testimony. However, we caution the Government that expert testimony regarding the more elementary concepts of detection avoidance will in many instances be unnecessary and in different circumstances could lead to a finding of reversible error.

II. Tapia-Ortiz's Sentence Enhancement

Tapia-Ortiz claims that his sentence should be vacated because there was insufficient evidence to support the district court's finding that he was involved in a related drug transaction for 60 to 100 kilograms of heroin. The district court's factual findings are reviewed under a clearly erroneous standard. *United States v. Burnett*, 968 F.2d 278, 280 (2d Cir. 1992).

The district court based its findings on the testimony provided by Agent Payne at a *Fatico* hearing. Agent Payne indicated that Isaziga had informed him during debriefing sessions that prior to any negotiations with Tapia-Ortiz, Isaziga had met with an individual named "Cedeno" in Colombia. Isaziga and Cedeno allegedly agreed that the cocaine deal would serve as a "test run" for a larger deal involving between 60 and 100 kilograms of

heroin. Cedeno apparently told Isaziga to contact Tapia-Ortiz when Isaziga returned to the United States, and that Tapia-Ortiz would serve as the contact person for both transactions. However, on the critical question of whether Isaziga had subsequently discussed the future heroin transaction with Tapia-Ortiz, Agent Payne's testimony was conflicted and ultimately inconclusive.

On direct examination, Agent Payne testified as follows:

> Q: What else was discussed down in South America about the — there was discussion about the cocaine. Was there any discussion about a heroin deal?
>
> A: As the subsequent — if the 20 kilos had gotten through and there were no problems, as far as Mr. Tapia was concerned, then there was suppose [sic] to be another deal in the future. The amount was not exactly known, but it was suppose [sic] to be somewhere between 60 and 100 kilos, as told to me by Mr. Isaziga.
>
> Q: Was it going to work the same way where the ultimate recipient would be the defendant in New York?
>
> A: Yes.
>
> Q: And was that also discussed? That was discussed in South America?
>
> A: Yes.

Agent Payne's direct examination provided no further information regarding whether Tapia-Ortiz knew about the negotiations between Isaziga and Cedeno in South America or that he was to play a role in a future heroin transaction.

During cross-examination, Agent Payne's testimony regarding Tapia-Ortiz's knowledge of the heroin deal was contradictory. The pertinent testimony reads:

Q: So there was no discussion about Mr. Tapia's role between Cedeno and Isaziga?

A: Other than the fact that he was to give the drugs to Mr. Tapia.

Q: Did Mr. Isaziga ever say he sat down and talked with Mr. Tapia Ortiz about 60 to 100 kilos?

A: No, he did not.

Q: Did he ever ask him to confirm whether that was true or not in any way? Did they talk about further deals, to the best of your knowledge?

A: Yes, they did.

Q: Further heroin deals?

A: Just — no, just that one heroin deal after the cocaine deal.

At best, this testimony contains inconsistent statements that provide scant support for the Government's position. First Agent Payne responded that Isaziga never said he talked with Tapia-Ortiz about the deal involving 60 to 100 kilograms of heroin. Then he said that "they" talked about the "one heroin deal after the cocaine deal." The first statement flatly exculpated Tapia-Ortiz with respect to knowledge of the "heroin deal." The second statement is ambiguous depending on who the word "they" refers to. If the reference is to Isaziga and Cedeno, then Tapia-Ortiz is not implicated. If the reference is to Isaziga and Tapia-Ortiz, then the second statement cannot be reconciled with the first. Thus, we do not see how this testimony can be taken to mean that Isaziga definitely discussed the heroin deal with Tapia-Ortiz. Agent Payne subsequently admitted that at no time did he attempt to have Isaziga record Tapia-Ortiz talking about heroin and that the agent who listened to recorded conversations between Isaziga and Tapia-Ortiz never heard them talk about a heroin deal.

The Government argues that it is at least a reasonable inference from this evidence that Tapia-Ortiz was aware that the cocaine deal was simply a dry run for a larger heroin deal in which he was also to be the recipient. However, this argument simply requires too great a leap from the actual evidence presented. Even if Isaziga and Cedeno both believed Tapia-Ortiz would serve as the contact person for a future heroin transaction, and even if he would have been willing to do this if asked, the Government failed to show by a preponderance of the evidence that he knew of the transaction and agreed to participate in it.

The district court imputed knowledge to Tapia-Ortiz based on the statement of Cedeno, his alleged co-conspirator, that Tapia-Ortiz would serve as the buyer in both transactions. Yet even if we assume *arguendo* that Tapia-Ortiz was involved in an uncharged conspiracy with Cedeno, the Government must show that the actions of Cedeno were in furtherance of the conspiracy and were reasonably foreseeable to Tapia-Ortiz before Tapia-Ortiz can be held responsible for them. *See United States v. Miranda-Ortiz*, 926 F.2d 172, 177-78 (2d Cir.) (co-conspirator cannot be sentenced for certain conspiratorial acts unless there is proof that he knew or should have known about the details of those acts or could reasonably foresee that they would occur), *cert. denied*, 112 S. Ct. 347 (1991); *see also United States v. Martinez*, 987 F.2d 920, 926 (2d Cir. 1993) (conspirator's reasonable knowledge of relevant conduct is required by statute imposing mandatory minimum sentences for certain drug offenses). The Government has failed to meet this burden. Its argument that Tapia-Ortiz must have known of the future heroin deal because of his participation in the cocaine deal, without any further showing regarding the scope of Tapia-Ortiz's agreement with Cedeno, is simply untenable. Given the lack of evidence presented regarding Tapia-Ortiz's knowledge of the prospective heroin deal, we conclude that it was clearly erroneous for the district court to find that he was involved in this transaction, and therefore error to calculate his base offense level by including this conduct.

We have carefully considered the other points raised by defendants and find them to be without merit. For the reasons set forth above, we affirm the judgments of conviction but vacate Tapia-Ortiz's sentence and remand for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	RE-SENTENCING JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT
V.	
JUAN ANTONIO TAPIA-ORTIZ	
(Name of Defendant)	Case Number CR-91-1014(s-1)
	BARRY SCHULMAN, ESQ. Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____
☒ was found guilty on count(s) S-1, AND S-2 OF A TWO COUNT SUPERSEDING INDICTMENT after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	*Nature of Offense*	*Count Number(s)*
21 USC 846, 21 USC 841(a)(1) & 21 USC 841(b)(1)(a)	CONSPIRACY TO POSSESS W/INTENT TO DISTRIBUTE HEROIN & COCAINE	(S-1)
21 USC 841(a)(1) & 21 USC 841 (b)(1)(a)	POSSESSION W/INTENT TO DISTRIBUTE COCAINE	(S-2)

The defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) __ and discharged as to such count(s).

☐ Count(s) _____ (is) (are) dismissed on the motion of the United States.

☒ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

☒ It is ordered that the defendant shall pay to the United States a special assessment of $8100.00, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number: 534-60-0908

Defendant's mailing address: M.C.C.

Defendant's residence address: 4017 5th Avenue, Top Floor, Brooklyn, New York 11232

Date of Imposition of Sentence: July 09, 1993

Signature of Judicial Officer: /s/Thomas C. Platt

Name and Title of Judicial Officer: HON. THOMAS C. PLATT, CHIEF JUDGE/EDNY

Date: July 09, 1993

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 480 MONTHS AS TO COUNT ONE OF THE SUPERSEDING INDICTMENT; AND 480 MONTHS AS TO COUNT TWO OF THE SUPERSEDING INDICTMENT; TERMS OF IMPRISONMENT TO RUN CONCURRENT FOR A TOTAL OF 480 MONTHS IMPRISONMENT.

☐ The Court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district,

☐ at _____ a.m. / p.m. on _____.

☐ as notified by the Marshall.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows: _____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 YEARS AS TO (S-1) AND (S-2) SAID TERM SHALL RUN CONCURRENT FOR A TOTAL OF FIVE YEARS.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☒ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

☒ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

☒ The defendant shall not possess a firearm or destructive device.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

FINE

The defendant shall pay a fine of $100,000.00. The fine includes any costs of incarceration and/or supervision.

☒ This amount is the total of the fines imposed on individual counts, as follows: (S-1) AND (S-2)

☐ The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

- ☐ The interest requirement is waived.
- ☐ The interest requirement is modified as follows:

This fine plus any interest required shall be paid:

- ☐ in full immediately.
- ☐ in full not later than _____.
- ☐ in equal monthly installments over a period of _____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.
- ☐ in installments according to the following schedule of payments:

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

APPENDIX C

FED. RULE EVID., RULE 702
TESTIMONY BY EXPERTS

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

APPENDIX D

AMENDMENT V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the Witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.